No. 13669

United States
Court of Appeals
For the Ninth Circuit.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants.

vs.

CONSTRUCTORA, S. A., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-20-53

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

WILLIAM K. YOUNG,
810 S. Spring St.,
Los Angeles 14, Calif.

For Appellee:

NEWMAN & NEWMAN,
JOSEPH GALEA,
813 H. W. Hellman Bldg.,
354 S. Spring St.,
Los Angeles 13, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 12,890-C

CONSTRUCTORA, S. A., a Corporation,
Plaintiff,

vs.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners, Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO., a Co-Partnership,
Defendants.

COMPLAINT FOR TRESPASS TO PERSONAL PROPERTY

Comes Now the Plaintiff, Constructora S. A. and for cause of action for trespass to personal property alleges as follows:

I.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), and that defendants are residents of the County of Los Angeles, State of California, and plaintiff is a citizen of the Republic of Mexico.

II.

That Plaintiff, Constructora, S. A., is a citizen of the Republic of Mexico and is a Corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico. That Plaintiff is a corporation engaged, among other things, in the

construction and repair of public highways and roads in the Republic of Mexico. [2*]

III.

That Defendants, W. W. Shepherd and Norma D. Shepherd, are partners doing business as Shepherd Tractor and Equipment Company. That said Defendants are duly registered to do business in the County of Los Angeles, State of California; and said defendants are residents of the County of Los Angeles, State of California.

IV.

That on or about the 26th day of February, 1949, the defendants and each of them caused and directed the Sheriff of the County of Los Angeles, State of California, to levy attachment on a certain Caterpillar 12 Motor Grader, Serial Number 9K-7086, then in the custody of Balyea Truck Company, as an incident to the defendants' action brought by them in the Superior Court of the State of California, in and for the County of Los Angeles, entitled W. W. Shepherd and Norma D. Shepherd, copartners doing business as Shepherd Tractor and Equipment Company, versus Julio A. Villasenor, doing business under the firm names and style of Juavi Export Co., and Juavi Fibers Company, Case Number SCLA556290.

V.

That upon Plaintiff's demand for an undertaking on a third-party claim the defendants declined to

*Page numbering appearing at foot of page of original Certified Transcript of Record.

provide said Sheriff with said undertaking; and that on the 10th day of May, 1949, the defendants applied for and did obtain from the said Superior Court a restraining order prohibiting plaintiff from transferring and encumbering, selling or disposing of said Motor Grader or removing the same from its location.

VI.

That Balyea Truck Co. was served by the defendants with a copy of said restraining order and that said Balyea Truck Co. refused to deliver said Motor Grader to plaintiff until said restraining order was dissolved. [3]

VII.

That on or about the 9th day of May, 1949, the plaintiff herein filed a third-party claim in the above-named action, in the above-named court, claiming the ownership and title to the said Motor Grader referred to above. That on or about the 3rd day of June, 1949, a trial to determine title to and ownership of the said Motor Grader was had; and that on the 16th day of August, 1949, a judgment by the said court was entered in favor of plaintiff herein and against defendants; that said judgment declared the plaintiff sole owner of the said Motor Grader and that defendants, the Juavi Export Co., the Juavi Fibers Company and Julio A. Villasenor had no title to, interest in, or right to the said Motor Grader whatsoever.

VIII.

That prior to and immediately subsequent to the attachment herein above referred to, the defend-

ants and each of them had sufficient knowledge that the said Motor Grader was the property and equipment of the plaintiff herein.

IX.

That the plaintiff was under agreement with the Republic of Mexico for the construction of certain roads and highways in the Republic of Mexico. That this Motor Grader referred to above was purchased by the plaintiff, through the Juavi Export Co. acting as brokers, for the expressed purpose of employing it in the construction of said highways and roads in the Republic of Mexico. That the said agreement by and between the Republic of Mexico and the said plaintiff provided for specified date of completion of said highways and roads and that time for the completion of the highways and roads was of the essence. That the said Motor Grader was acquired by plaintiff to make it possible for the plaintiff to complete the highway and road project in time as provided by said agreement. [4]

X.

That the said Motor Grader was kept under the said attachment by the Sheriff of the County of Los Angeles, State of California, on the specific instructions of all defendants herein, and under restraining order of said court as above mentioned, for a period of one-hundred and seventy-two days (172 days), from the 26th day of February, 1949, up to and including the 16th day of August, 1949.

XI.

That during all this time the plaintiff was without

the services of the said Motor Grader. That plaintiff was unable to rent or procure another Motor Grader of like function and service. That plaintiff was forced to employ eighty-five (85) Mexican hand-laborers and one skilled foreman to do the work of one Motor Grader. That the total hand-labor cost for a twelve hour day was One Thousand One Hundred Twenty-four Dollars and Sixty-one Pesos ($1,124.61), that at the then current rate of exchange Five Pesos were obtainable for one (1) United States Dollar. That plaintiff's total expenditure for said hand labor for a period of One Hundred Seventy-two Days (172) was Thirty-six Thousand and Eight Hundred Eighty Dollars and Eighty-three Cents ($36,880.83) in United States Dollars. The daily cost of operation and maintenance of one Motor Grader, including the cost of one skilled operator for a twelve-hour day is Four Hundred and Ninety-two Pesos (492.) that at the above rate of exchange the total cost of operating said Motor Grader for the period of One Hundred and Seventy-two Days (172) would have been Fourteen Thousand One Hundred Thirty-seven Dollars and Sixty Cents ($14,137.60). That the plaintiff by losing the services of the said Motor Grader for a period of one hundred seventy-two days lost the sum of Twenty-two Thousand Seven Hundred and Forty-three Dollars and Twenty-three Cents [5] ($22,743.23).

XII.

That the said plaintiff sent from Mexico City, Mexico, its President and General Manager, Carlos

Oriani, to Los Angeles, State of California, to procure and employ legal counsel. That plaintiff did employ and retain the law firm of Newman and Newman to represent plaintiff in all matters necessary to obtain the release of said Motor Grader. That two more trips of said Carlos Oriani were necessary to procure all necessary evidence and to testify in the above-referred-to third-party claim. That the cost of the said three round-trips from Mexico City, Mexico, to Los Angeles, California, and back, cost the plaintiff approximately the sum of Seven Hundred and Fifty Dollars ($750.00).

XIII.

That the plaintiff paid Newman and Newman, Attorneys and Counsel, qualified to appear before all the courts of the State of California and the District Court of the United States, the sum of Five Hundred Dollars ($500.00) as legal fees and costs to file the third party claim herein above referred to, and to bring about the release of plaintiff's Motor Grader referred to above.

XIV.

That defendant's wrongful acts were done with knowledge of plaintiff's title to an ownership of the said Motor Grader; and for said malice and wilful recklessness to plaintiff's rights, the plaintiff asks for the sum of Five Thousand Dollars ($5,000.00), as punitive damages.

Wherefore: The plaintiff prays the court that plaintiff, Constructora, S. A., be awarded judgment as follows:

(1) $22,743.23 for loss of use of Motor Grader;

(2) $750.00 for cost of travel incurred by plaintiff to obtain the release of said Motor Grader;

(3) $500.00 for legal fees and costs in filing a third-party claim for the release of the Motor Grader; [6]

(4) $5,000.00 for punitive damages;

(5) For costs of suit incurred herein;

(6) For such other and further relief as the court deems just and proper.

NEWMAN & NEWMAN, and

JOSEPH GALEA.

By /s/ ANTHONY N. NEWMAN.

Amendment to complaint dated February 20, 1952.

[Endorsed]: Filed February 20, 1951. [7]

[Title of District Court and Cause.]

AMENDED ANSWER

Come Now defendants above named and file this, their amended answer to plaintiff's complaint herein, as a matter of course, and admit, deny and allege as follows:

I.

Answering the allegations contained in paragraphs II, IX, XI, XII and XIII thereof, defendants allege that they have no information or belief

upon the subjects therein alleged sufficient to enable them to answer the same and, placing their denial on that ground, defendants deny generally and specifically each and every allegation contained in said paragraphs II, IX, XI, XII and XIII, and specifically deny that plaintiff has been damaged in the amounts therein alleged, or in any other amount or amounts, or at all. [8]

II.

Defendants deny generally and specifically each and every allegation contained in paragraph IV thereof, excepting that they admit that on or about February 25, 1949, they instructed said sheriff to garnish in said action said Motor Grader, which they admit was then in the possession of said Belyea Truck Co., and that on February 26 1949, said sheriff served a notice of garnishment on said Belyea Truck Co.

III.

Answering the allegations contained in paragraph V thereof, defendants admit that a demand on the sheriff was filed by plaintiff herein on a third-party claim in said action that said Motor Grader be immediately released and surrendered to said plaintiff and that in said action the court issued the restraining order described. Defendants deny that plaintiff demanded an undertaking on said third-party claim. Defendants allege that said sheriff notified them on May 10, 1949, of the receipt by him of said third-party claim and further notified these defendants that said Motor Grader would be re-

leased as demanded unless an undertaking was furnished to him as provided by law. Defendants allege that on said date they declined to provide the undertaking mentioned and on or about said date so notified said sheriff and the agent of plaintiff herein.

IV.

Answering the allegations contained in paragraph VI thereof, defendants allege that they have no information or belief sufficient to enable them to answer the allegations contained therein that Belyea Truck Co. refused to deliver said Motor Grader to plaintiff herein until the restraining order mentioned was dissolved and, placing their denial on that ground, defendants deny same generally and specifically.

Defendants deny that Belyea Truck Co. was served by them with [9] a copy of the restraining order mentioned.

V.

Answering the allegations contained in paragraph VII thereof, defendants deny that said trial occurred on July 29, 1949, or on any date except June 3, 1949, and deny that said judgment was rendered on July 29, 1949, or on any date other than August 17, 1949. Defendants further deny that said judgment declared plaintiff herein sole owner of said Motor Grader and that said Juavi Export Co., the Juavi Fibers Company and Julio A. Villasenor had no title to and/or interest in and/or right to said Motor Grader whatsoever. Defendants admit that said judgment did declare that plaintiff herein was

the owner and was entitled to the possession of said Motor Grader.

VI.

Defendants deny generally and specifically each and every allegation contained in paragraphs VIII and XIV thereof.

VII.

Defendants deny generally and specifically each and every allegation contained in paragraph X thereof, excepting that they admit that on and after May 10, 1949, and to and including on or about August 9, 1949, the restraining order mentioned had not been modified or terminated.

For a Further, Separate and Affirmative Defense to Plaintiff's Alleged Cause of Action Herein, Defendants Allege as Follows:

I.

That prior to February 26, 1949, Julio A. Villasenor, doing business under the firm names and styles of Juavi Export Co. and Juavi Fibers Company, caused the Motor Grader mentioned to be deposited with Shaw Sales and Service Co., 5100 Anaheim-Telegraph Road, Los Angeles, California, and that thereafter the same remained continuously in storage thereat to and including [10] February 24, 1949, when same was moved to the yard of Belyea Truck Co., and on February 26, 1949, and pursuant to written instructions delivered to said sheriff by defendants herein to garnish said Motor Grader,

said sheriff delivered a notice to said Belyea Truck Co. that all monies, goods, credits, effects, and debts due or owing, or any personal property belonging to said Julio A. Villasenor, doing business under the firm names and styles of Juavi Export Co. and Juavi Fibers Company, and in the possession and under the control of said Belyea Truck Co. were attached, and the latter was directeed not to pay over or transfer the same to anyone but said sheriff. The statement in writing of said garnishee describing such property was also demanded by said sheriff at the same time he delivered to said Belyea Truck Co. a copy of the writ of attachment issued in the action described in the complaint herein. That no further or other instructions were given by defendants herein to said sheriff with reference to said Motor Grader.

II.

That the Motor Grader referred to is mounted on six wheels with rubber tires, four of which are in the rear and two in front. That the same is powered with a diesel motor and is equipped with a tandem drive and may be driven by a single operator over any roadway or surface at a continuous speed of approximately twelve miles per hour. That the same was so equipped on February 26, 1949, and was in good operating condition.

III.

That following delivery by said sheriff of said notice and writ as aforesaid, said Motor Grader thereafter remained continuously in the possession

of Belyea Truck Co. as a result of the deposit of said Motor Grader with it by Julio A. Villasenor, doing business under the firm names and styles of Juavi Export Co. and Juavi Fibers Company, and said restraining order, and not [11] otherwise, until on or about August 17, 1949, when said Belyea Truck Co. delivered the same to plaintiff herein at Tijuana, Mexico.

Wherefore, defendants pray that plaintiff take nothing by its action and that defendants be awarded judgment for their costs of suit herein.

/s/ WILLIAM K. YOUNG,
Attorney for Defendants

Receipt of copy acknowledged.

[Endorsed]: Filed April 6, 1951. [12]

[Title of District Court and Cause.]

MINUTES OF THE COURT—FEB. 11, 1952

At Los Angeles, Calif.

Present: The Honorable James M. Carter,
District Judge.

Nature of Proceedings—Ruling

For Pretrial Hearing:

On motion of plaintiff it is ordered that the complaint be amended by interlineation in several instances, and amendments are made in the original complaint by interlineation at this time.

On motion of plaintiff it is ordered that plaintiff may file an amendment to its complaint as to paragraph eleven, and it is stipulated and ordered that the new allegation be deemed denied by defendants.

Court and counsel confer as to the facts and issues.

It Is Ordered that plaintiff prepare and present pretrial stipulation of facts and issues for the Court's approval within ten days.

EDMUND L. SMITH,
Clerk.

By /s/ L. B. FIGG,
Deputy Clerk. [14]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Upon motion of plaintiff herein the above-entitled Court did on the 11th day of February, 1952, order that plaintiff's complaint, paragraph XI thereof, be amended to read as follows:

"That plaintiff was deprived of the use of said motor grader during the time above alleged. That although plaintiff did seek to rent or procure another motor grader of like function and service, plaintiff was unable to find another such motor grader;

"That the reasonable rental cost to plaintiff of a similar motor grader in the County of Los Angeles, during the time the same was wrongfully detained by the defendants herein, and as such the damage

to the plaintiff was the sum of Twelve Thousand and Forty Dollars ($12,040.00)."

The said Court also did order that defendants herein shall [15] be deemed to have denied all of the allegations contained in said paragraph XI as above amended.

NEWMAN & NEWMAN, and
JOSEPH GALEA,
Attorneys for Plaintiff.

By /s/ ANTHONY M. NEWMAN.

It Is So Ordered this 20th day of February, 1952.

/s/ JAMES M. CARTER,
Judge, U. S. District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 20, 1952. [16]

[Title of District Court and Cause.]

STIPULATION OF FACTS AND ISSUES AND PRE-TRIAL ORDER

I.

Stipulation of Facts

It Is Stipulated, by and between the parties hereto, through their respective counsel of record, that the following facts are true:

1. That plaintiff, Constructora, S. A., is, and was at all times herein mentioned, a citizen of the Re-

public of Mexico and is a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico.

2. That Carlos Oriani is, and was at all times herein mentioned, the duly constituted and appointed General Manager and representative of the plaintiff herein.

3. That on the 25th day of February, 1949, defendants herein instructed the Sheriff of the County of Los Angeles to garnish [18] the motor grader in question, which was then located at the yard of the Belyea Trucking Company.

4. That said garnishment was served pursuant to a writ of attachment issued upon the application of defendants, as an incident to defendants' action brought by them in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "W. W. Shepherd and Norma D. Shepherd, co-partners doing business as Shepherd Tractor and Equipment Company, versus Julio A. Villasenor, doing business under the firm names and style of Juavi Export Co. and Juavi Fibers Company," Case Number SCLA 556290.

5. That on the 9th day of May, 1949, plaintiff herein filed with the Sheriff of the County of Los Angeles, a third-party claim to said motor grader.

6. That on the 10th day of May, 1949, the Sheriff of the County of Los Angeles demanded of the defendants herein an undertaking on said third-party claim.

7. That on the 10th day of May, 1949, defendants declined to provide said Sheriff with said undertaking.

8. That on the 10th day of May, 1949, defendants herein applied for, and did obtain from the Superior Court of the State of California, in and for the County of Los Angeles, a restraining order, by virtue of which plaintiff amongst others was restrained from transfering, encumbering or making any other disposition of said motor grader, or removing the same from its present location until the proceedings for the determination of the title of said motor grader were prosecuted to a final determination, and that said restraining order remained in effect up to and including the 16th day of August, 1949.

9. That on or about the 11th day of May, 1949, the plaintiff herein filed a third-party claim in the above-mentioned action, in the above-named court, claiming the ownership and title to the [19] said motor grader referred to above. That on or about the 3rd day of June, 1949, a trial to determine title to and ownership of said motor grader was had; and that on the 16th day of August, 1949, a judgment by the said Court was entered and recorded in the files of the Superior Court of the State of California, in and for the County of Los Angeles, in favor of plaintiff herein and against defendants; that said judgment held "that the third-party claimant is the owner and is entitled to the possession of the motor grader under attachment and that the Sheriff be ordered to release said property to it."

10. That if Carlos Oriani should be called to the stand as a witness, he would testify that:

(a) The Plaintiff spent a total of Two Hundred Twenty-five Dollars ($225.00) for expenses in pursuit of the chattel in question, aside from attorney's fees paid.

(b) That on April 14, 1949, Mr. Oriani granted, on behalf of plaintiff, a power of attorney to Anthony M. Newman and retained him as counsel to prosecute the third-party claim, and that prior to this date, as mentioned, Anthony M. Newman had not been retained as counsel for, nor did he hold the power of attorney of, the plaintiff.

II.

Documentary Evidence to Be Permitted

It Is Hereby Stipulated that only the following documents shall be introduced in evidence at trial by the parties herein:

1. By plaintiff:

(a) File and records of the Superior Court of the State of California, in and for the County of Los Angeles, No. 556290, entitled "W. W. Shepherd, et al., versus Julio A. Villasenor, et al."

(b) Photostats or original pertaining to application and export permit concerning shipment of the motor grader in [20] question.

(c) Documents pertaining to proof of expenses incurred by plaintiff in pursuit of return of motor grader.

2. By defendants:

(a) File of Sheriff of the County of Los Angeles concerning attachment or garnishment of the motor grader in question, or copies thereof.

(b) File of Belyea Trucking Company concerning the said motor grader, or copies thereof.

(c) Documents or photostats pertaining to applications for, and export permits concerning the shipment of said motor grader, or copies thereof.

III.

General Stipulations

1. It is stipulated that plaintiff and defendants shall be limited to one expert witness each to prove the reasonable rental value in the County of Los Angeles of a motor grader of the type in question during the period of February 26, 1949, to and including August 16, 1949. No implication shall arise from the foregoing that defendants concede the admissibility of such evidence, and said stipulation is without prejudice to any rights of the parties herein.

2. It is stipulated that there shall be no other expert witnesses used on trial by either party.

3. It is stipulated that should the Court find for the plaintiff and against the defendants, the Court shall, from its examinations of the third-party claim file, determine the reasonable amount of attorney's fees that defendants shall be liable for, as part of the special damages due plaintiff herein.

4. It is stipulated that the allegations of paragraph XI as amended by order of Court issued on February 11, 1952, are deemed denied by the defendants herein. [21]

5. It is stipulated that the general damages of plaintiff, if any are assessed by the Court, in addition to the expense of recovery of the motor grader, shall be the net or gross rental value of said motor grader for the period it was wrongfully detained in the County of Los Angeles, but in an amount which the Court finds is not disproportionate to the value of the motor grader.

IV.

Statement of Issues

It Is Further Stipulated that the issues joined in the above action include the following:

A—Liability.

1. Was there a valid levy of an attachment on the motor grader that operated to deprive plaintiff of its possession?

2. Did the garnishment served on Belyea Trucking Company operate to deprive plaintiff of the possession of the motor grader?

3. What effect, if any, did Belyea Trucking Company's omission to answer the Sheriff on the garnishment have on plaintiff's right to possession of the motor grader prior to August 4, 1945?

4. Did the Superior Court have jurisdiction to

determine the third-party claim, and may such issue be raised in this action?

5. If the issues determined by the judgment of the Superior Court are not res adjudicated because of the judgment being void, then are the issues purportedly determined therein issues to be determined in this action?

6. Is the mere procurement of an injunction independent of other circumstances actionable, if judgment is not ultimately recovered by the party procuring same?

7. Does the fact that defendants herein were not required by plaintiff to furnish a bond or undertaking in support of said restraining order, absolve the defendants from any liability herein [22] for damages for the detention of said motor grader?

B—Damages.

1. If an owner recovers property of which he is wrongfully deprived, are the damages he may be entitled to limited to the expense of its recovery, with interest?

2. If damages are recoverable in excess of the cost of recovery of the property mentioned, plus interest, is such excess limited to the net or gross rental value thereof in an amount not disproportionate to the value of the property?

3. The period for which plaintiff is entitled to recover the rental value of the motor grader, either gross or net rental.

4. Is the period for which plaintiff may be entitled to recover the net or gross value of said motor grader affected by plaintiff's action in the following respects:

(a) The omission of plaintiff to file its third-party claim, or to institute other action or proceedings to recover the motor grader between February 26, 1949, and May 9, 1949.

(b) The omission of plaintiff to apply for a modification of the injunction of the Superior Court or an order requiring the filing of a bond as a condition for the continuance of said injunction.

Dated March 3, 1952.

NEWMAN & NEWMAN, and
JOSEPH GALEA,
Attorneys for Plaintiff.

By /s/ ANTHONY M. NEWMAN.

/s/ WILLIAM K. YOUNG,
Attorney for Defendants.

It Is So Ordered.

/s/ JAMES M. CARTER,
Judge, U. S. District Court.

[Endorsed]: Filed March 4, 1952. [23]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 29, 1952

Present: The Honorable James M. Carter,
District Judge.

This cause having been taken under submission, and the Court having duly considered the matter, the Court now finds in favor of the plaintiff and against the defendants, and assesses the recovery in the total sum of $2,898.70, consisting of damages for five months and twenty-one days at $381.40 per month, $2,173.70; attorney's fees $500.00; and expenses of recovering property, $225.00; plaintiff to have its costs of suit; counsel for plaintiff to prepare and present findings of fact, conclusions of law and judgment within ten days.

EDMUND L. SMITH,
Clerk.

By /s/ L. B. FIGG,
Deputy Clerk. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial on the 4th day of March, 1952, in the United States District Court for the Southern District of California, Central Division, Honorable James M. Carter, Judge Presiding, without a jury, the plaintiff being repre-

sented by its counsel of record, Newman & Newman, by Anthony M. Newman, Esq. and Joseph Galea, Esq.; the defendants W. W. Shepherd and Norma D. Shepherd, co-partners doing business as Shepherd Tractor & Equipment Co., a co-partnership, being represented by William K. Young, Esq.; and

Evidence both oral and documentary having been received, and the cause being argued by all counsel and submitted for decision, the court now makes findings of fact and conclusions of law as [25] follows:

I.

That it is true that plaintiff Constructora, S. A. is, and was at all times herein mentioned, a citizen of the Republic of Mexico and is a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico.

II.

That is is true that defendants W. W. Shepherd and Norma D. Shepherd are partners doing business as Shepherd Tractor and Equipment Company. That said defendants are duly registered to do business in the County of Los Angeles, State of California; and said defendants are residents of the County of Los Angeles, State of California.

III.

That it is true that Carlos Oriani is, and was at all times herein mentioned, the duly constituted and appointed General Manager and representative of the plaintiff herein.

IV.

That it is true that in an action pending in the Superior Court of the State of California, in and for the County of Los Angeles, No. 556290 and entitled W. W. Shepherd, et al., versus Julio A. Villasenor, et al., the defendants did on the 25th day of February, 1949, garnish and attach a certain Caterpillar 12 Motor Grader, Serial Number 9K-7086, and that said Motor Grader was then in the possession of the Belyea Truck Company, a trucking company, and that said equipment had been delivered to said trucking company by plaintiff's agent for shipment to plaintiff.

V.

That it is true that said garnishment was served pursuant to a Writ of Attachment issued upon the application of defendants as an incident to defendants' action brought by them in the Superior Court of the State of California, in and for the County of Los Angeles, entitled W. W. Shepherd and Norma D. Shepherd, co-partners [26] doing business as Shepherd Tractor and Equipment Company, versus Julio A. Villasenor, doing business under the firm names and style of Juavi Export Co. and Juavi Fibers Company, Case Number S.C.L.A. 556290.

VI.

That it is true that on the 9th day of May, 1949, a third party claim was filed by the plaintiff with the Sheriff of the County of Los Angeles, asserting title in, and demanding release of, said Motor

Grader, and that on the 10th day of May, 1949, said Sheriff served notice upon defendants as provided by Section 689 of the California Code of Civil Procedure requiring the defendants to post bond, and that said defendants refused to post said bond and so notified said Sheriff of said county.

VII.

That it is true that on the 10th day of May, 1949, defendants herein applied for and did obtain from the Superior Court of the State of California, in and for the County of Los Angeles, a restraining order, by virtue of which plaintiff, amongst others, was restrained from transfering, encumbering or making any other disposition of said Motor Grader, or removing the same from its present location until the proceedings for the determination of the title of said Motor Grader were prosecuted to a final determination, and that said restraining order remained in effect up to and including the 16th day of August, 1949, and that defendants did not post an indemnity bond upon obtaining said restraining order.

VIII.

That it is true that on the 10th day of May, 1949, the defendants petitioned the said Superior Court of the State of California, in and for the County of Los Angeles, for a hearing on the Third Party Claim.

IX.

That it is true that on or about the 3rd day of June, 1949, [27] a trial to determine title to and

ownership of said Motor Grader was had in said Superior Court, and that on the 16th day of August, 1949, a judgment by the said court was entered and recorded in the files of the Superior Court of the State of California, in and for the County of Los Angeles, in Book 2069, Page 152, of Judgment Book of said court, in favor of plaintiff herein and against defendants; that said judgment held among other things: "that the third party claimant is the owner and is entitled to the possession of the motor grader under attachment and that the Sheriff be ordered to release said property to it"; and that it is true that this action was promptly tried and that no delay in the trial of said action was sought by plaintiff herein.

X.

That it is true that the said Motor Grader, the property of plaintiff herein, was detained by the defendants and withheld from said plaintiff, and was so detained for the period of five months and twenty-one days; that during two months and fourteen days, to wit: From February 26, 1949, to and including May 10, 1949, the said Motor Grader was so detained and withheld by virtue of said Writ of Attachment and garnishment; and that during three months and six days, to wit: From May 10, 1949, to August 16, 1949, the said Motor Grader was detained by virtue of the Restraining Order petitioned for and obtained by said defendants.

XI.

That it is true that by reason of said detention plaintiff did sustain damages for the loss of reason-

able rental use of said Motor Grader, and the total amount of $2,173.70 for the detention of said Motor Grader for the period of five months and twenty-one days at the rate of $381.40 net per month; that it is true that upon stipulation of both parties entered into in open court during trial of said cause, it was stipulated and agreed that in the event plaintiff were to be entitled to recover damages for the loss of [28] use of said Motor Grader, the measure of damages was to be computed in the alternative as follows: $30.20 per day; $148.00 per week; and $381.40 per month; that the rates so stipulated to were computed in concert by one expert witness for the plaintiff and one expert witness for the defendant.

XII.

That is is true that the monthly rate of $381.40 for the loss of use of said Motor Grader was the rate found by this court to be the measure of damages.

XIII.

That it is true that plaintiff did pay the sum of $500.00 to its attorneys, Newman & Newman, to procure the release of said Motor Grader, and that the said sum of $500.00 was a reasonable sum for the services rendered to plaintiff by said law firm.

XIV.

That it is true that plaintiff did expend the sum of $225.00 in pursuit of said chattel.

Conclusions of Law

As conclusions of law from the findings of facts the court finds as follows:

I.

That on the 25th day of February, 1949, the defendants petitioned the Superior Court of the State of California, in and for the County of Los Angeles, to garnish and attach a certain Caterpillar 12 Motor Grader, Serial Number 9K7086, the property of the plaintiff. That said Writ of Garnishment and Attachment was lawfully issued by said court and lawfully served by the Sheriff of the County of Los Angeles, State of California, and that by virtue of said Writ of Attachment said Sheriff did take valid and lawful possession of said Motor Grader. The said Writ of [29] Attachment remained in full force and effect from the 25th of February, 1949, to and including the 10th day of May, 1949.

II.

That on the 10th day of May, 1949, defendants herein caused the said Superior Court to issue a valid restraining order, by virtue of which the plaintiff, among other parties, was restrained from transferring, encumbering or making any other disposition of said Motor Grader, or removing the same from its location until the proceedings for the determination of the title of said Motor Grader were prosecuted to a final determination; and that said restraining order remained in effect up to and including the 16th day of August, 1949.

III.

That the fact that plaintiff did not require defendants to post an indemnity bond for the said restraining order obtained by defendants as aforesaid, does not relieve defendants from liability for all damages directly and proximately caused by defendants' trespass which interfered with the plaintiff's right to possession of the said Motor Grader, including loss of use, monies expended in pursuit of the chattel, and attorney's fees expended in the prosecution of a Third Party Claim to recover said Motor Grader; and that the fact the defendants did not act with malice or ill will, or without probable cause, does not excuse the said defendants from the damages caused plaintiff by said defendants.

IV.

That the Superior Court of the State of California, in and for the County of Los Angeles, which tried said Third Party Claim had jurisdiction to try said cause to determine title to and possession of said Motor Grader; that further the defendants herein are estopped from questioning the jurisdiction of said court in the trial of the Third Party Claim, since the defendants themselves requested the said Superior Court to set the Third Party Claim for [30] trial and determination.

V.

That taking into consideration the circumstances of the Third Party Claim and the procedure had therein, the residence and citizenship of the plain-

tiff, and the nature of the controversy, the plaintiff herein acted in a businesslike, prudent, and timely manner in protecting and asserting its rights to the possession of said Motor Grader.

VI.

That defendants' acts in obtaining the Writ of Attachment and Restraining Order as aforesaid constitute an unlawful interference and trespass to plaintiff's title to and right to possession of said Motor Grader, and that therefore this court finds that plaintiff is entitled to judgment against the defendants in the sum of $2,898.70, and that plaintiff is to have its cost of suit, and that said judgment be entered accordingly.

Done in Open Court this 19th day of September, 1952.

/s/ JAMES M. CARTER,
Judge, United States District Court.

Approved by defendants as to form:

/s/ WILLIAM K. YOUNG,
Attorney for Defendants.

Affidavit of service by mail attached.

Revised Proposed Findings, etc. Lodged September 16, 1952.

[Endorsed]: Filed September 16, 1952. [31]

In the District Court of the United States, Southern District of California, Central Division

No. 12,890-C

CONSTRUCTORA, S. A., a Corporation,

Plaintiff,

vs.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO., a Co-partnership,

Defendants.

JUDGMENT

This cause came on regularly for trial on the 4th day of March, 1952, in the United States District Court for the Southern District of California, Central Division, Honorable James M. Carter, Judge presiding, without a jury, the plaintiff being represented by its counsel of record, Newman & Newman, by Anthony M. Newman, Esq. and Joseph Galea, Esq.; the defendants, W. W. Shepherd and Norma D. Shepherd, co-partners doing business as Shepherd Tractor & Equipment Co., a co-partnership, being represented by William K. Young, Esq.; and,

Evidence both oral and documentary having been received, and the cause having been further argued by all counsel and submitted for decision, and the Court having heretofore made its findings of fact and conclusions of law, now renders judgment in accordance [33] with the findings of fact and conclusions of law as follows:

It Is Ordered, Adjudged and Decreed:

That plaintiff have judgment against the defendants in the sum of Two Thousand Eight Hundred Ninety-eight Dollars and Seventy Cents ($2,898.70), and that plaintiff have its costs of suit herein.

Costs taxed at $49.14.

The Clerk is ordered to enter this Judgment.

Done in open Court this 19th day of Sept., 1952.

/s/ JAMES M. CARTER,
Judge, United States District Court.

Affidavit of service by mail attached.

Receipt of copy acknowledged.

Lodged May 1, 1952.

[Endorsed]: Filed September 19, 1952.

Docketed and entered September 22, 1952. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendants W. W. Shepherd and Norma D. Shepherd, co-partners doing business as Shepherd Tractor & Equipment Co., a co-partnership, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the

final judgment entered in this action on September 22, 1952.

/s/ WILLIAM K. YOUNG,
Attorney for Defendants.

Dated: October 16, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed October 16, 1952. [36]

[Title of District Court and Cause.]

ORDER EXTENDING DEFENDANTS' TIME FOR FILING AND DOCKETING RECORD ON APPEAL

Upon application of defendants, and it appearing to be a proper case for such an order and to allow additional time for the preparation of the reporter's transcript herein; now therefore,

It Is Hereby Ordered that the time be, and it is hereby, extended to and including December 24, 1952, within which the defendants may file the record on appeal herein and docket the same with the appellate court.

Dated: November 14, 1952.

/s/ JAMES M. CARTER,
Judge.

[Endorsed]: Filed November 14, 1952. [40]

In the United States District Court, Southern District of California, Central Division

No. 12,890-C

CONSTRUCTORA, S. A., a Corporation,
Plaintiff,

vs.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO., a Co-partnership,
Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, March 4, 1952

Appearances:

For the Plaintiff:
NEWMAN & NEWMAN, By
ANTHONY NEWMAN, ESQ., and
JOSEPH GALEA, ESQ.

For the Defendants:
WILLIAM K. YOUNG, ESQ.

* * *

Mr. Newman: If the Court please, I wish to offer into evidence the file of the third party claim suit, as mentioned in the trial brief of the plaintiff.

Mr. Young: I object to it on the ground that it

appears on the face of the pleadings contained in the claim that the court had no jurisdiction.

The Court: We will mark it for identification as Plaintiff's Exhibit 1. [2*]

* * *

The Court: You have got a nice point, and it is going to depend on what is the definition of that word "levy."

I am going to overrule your objection and admit the third party file into evidence, reserving to you a motion to strike, which you have to again call to the court's attention. I will reserve you that right. That will give us some more time to look into this question of levy. [4]

It will be received in evidence as Plaintiff's Exhibit 1.

(The document referred to, and marked Plaintiff's Exhibit 1, was received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

In the Superior Court of the State of California in and for the County of Los Angeles

No. 556290

W. W. SHEPHERD, et al., etc.,

Plaintiffs,

vs.

JULIO A. VILLASENOR, etc.,

Defendant.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiff's Exhibit No. 1—(Continued)

PETITION FOR HEARING TO DETERMINE TITLE RE THIRD PARTY CLAIM OF CONSTRUCTORA, S. A., A MEXICAN CORPORATION

To the Superior Court of the State of California in and for the County of Los Angeles:

Come Now plaintiffs, as petitioners, and represent to the court as follows:

That on or about February 26, 1949, plaintiffs caused to be levied by the Sheriff of Los Angeles County, California, a writ of attachment issued in the above-entitled action, on the personal property hereinafter described and situated at Belyea Truck Co., 6800 South Alameda Street, Los Angeles, California.

That on or about May 9, 1949, Constructora, S. A., a Mexican corporation, by and through its attorneys, Newman & Newman, delivered to said Sheriff a verified third party claim wherein the title and ownership of said personal property was claimed by said Constructora, S. A., a Mexican corporation. That on May 10, 1949, said Sheriff notified plaintiffs of the delivery to him of said third party claim, and stated that unless the undertaking required by Section 689 of the Code of Civil Procedure was delivered to him, he would release said property. That plaintiffs declined to provide the undertaking mentioned and requested.

That plaintiffs hereby petition the court to grant a hearing for the purpose of determining the title

Plaintiff's Exhibit No. 1—(Continued)

to said personal property. That pending the final determination of said matter it would be in the furtherance of justice to forbid a transfer, removal from its present location, or other disposition of said personal property by said claimant, his agent, or defendant herein.

The personal property referred to is described as follows:

Caterpillar 12 Diesel Motor Grader, Serial #9K-7086, and same is presently located at Belyea Truck Co., 6800 South Alameda Street, Los Angeles, California.

Wherefore, petitioners pray that an order be made granting a hearing before the above-entitled court for the purpose of determining title to the personal property herein described, and that pending the final determination of said matter, Constructora, S. A., a Mexican corporation, its agent, or defendant herein be forbidden from making a transfer or other disposition of said personal property or removing the same from its present location.

Dated: May 10, 1949.

W. W. SHEPHERD and NORMA B. SHEPHERD, Co-partners, Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO.

By /s/ W. W. MURPHY,
Credit Manager,
Plaintiffs and Petitioners.

Plaintiff's Exhibit No. 1—(Continued)

/s/ WILLIAM K. YOUNG,
Attorney for Plaintiffs and
Petitioners.

[Endorsed]: Filed May 10, 1949, Superior Court.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 556290

W. W. SHEPHERD, et al., etc.,

Plaintiffs,

vs.

JULIO A. VILLASENOR, etc.,

Defendant.

ORDER FOR, AND NOTICE OF, HEARING TO DETERMINE TITLE RE THIRD PARTY CLAIM OF CONSTRUCTORA, S. A., A MEXICAN CORPORATION, AND RESTRAINING ORDER

It appearing to the satisfaction of the court from the petition of plaintiffs that on or about May 9, 1949, Constructora, S. A., a Mexican corporation, by and through its attorneys, Newman & Newman, delivered to the Sheriff of Los Angeles County, California, a verified claim of ownership of certain personal property levied upon by said Sheriff under and by virtue of a writ of attachment issued in the

Plaintiff's Exhibit No. 1—(Continued)

above-entitled action, said personal property being described as follows:

Caterpillar 12 Diesel Motor Grader, Serial #9K-7086, and presently located at Belyea Truck Co., 6800 South Alameda Street, Los Angeles, California,

It Is Hereby Ordered that a hearing be had in Department 1 of the above-entitled court on the 23rd day of May, 1949, at the hour of 9:15 a.m. of said day, for the purpose of determining title to said personal property in accordance with Section 689 of the Code of Civil Procedure.

Notice Is Hereby Given to all parties claiming an interest in said property to appear at said time and place and present their claims.

It further appearing that plaintiffs have declined to provide said Sheriff with the undertaking mentioned in Section 689 of the Code of Civil Procedure.

It Is Ordered that until the proceedings for the determination of the title mentioned are prosecuted to final determination, the said Constructora, S. A., a Mexican corporation, its agent, and or defendant herein be, and they are hereby, forbidden from transferring, encumbering, or making any other disposition of said personal property or removing the same from its present location.

Dated: May 10th, 1949.

/s/ [Illegible]

Presiding Judge.

Plaintiff's Exhibit No. 1—(Continued)

Office of the Sheriff,
County of Los Angeles,
State of California.

I, E. W. Biscailuz, Sheriff of the County of Los Angeles, do hereby certify that I received the annexed third party claim on the 10th day of May, 1949, and I further certify that I have complied with Section 689 CCP.

Dated: May 11, 1949.

E. W. BISCAILUZ,
Sheriff,
By /s/ F. E. MOONEY,
Deputy Sheriff.

[Endorsed]: Filed May 10, 1949, Superior Court.

In the Superior Court of the State of California
in and for the County of Los Angeles
No. 556290

W. W. SHEPHERD, et al.,
Plaintiffs,
vs.
JULIO A. VILLASENOR, Doing Business Under the Firm Names and Styles of JUAVI EXPORT CO. and JUAVI FIBERS COMPANY,
Defendants.

THIRD PARTY CLAIM

To the Sheriff of the County of Los Angeles:

You Are Hereby Notified that the following described property held by you under attachment in

Plaintiff's Exhibit No. 1—(Continued)

the above-entitled action is, and at the time of the levy was, the property of Constructora, S. A., a Mexican corporation, and that said corporation is entitled to its possession; that said corporation acquired title to said property on the 10th day of June, 1948, by purchase from Julio A. Villasenor, doing business under the fictitious firm names of Juavi Export Company and formerly known as Juavi Fibers Company; that title of said property was conveyed to the claimant by commercial invoice on said last mentioned date, and that thereafter the said property was placed in storage by claimant pending shipment and that shortly before the attachment, claimant instructed the Belyea Truck Company to ship said property to claimant, but that said shipment was not consummated, and that ever since its sale and subsequent storage, said property has been stored for the account and benefit of claimant, first with the Shaw Sales Company at Wilmington, California and subsequently with the Belyea Truck Company, who was to ship said property to Mexico where claimant resides.

That claimant paid Juavi Export Company the sum of Ten Thousand Five Hundred Dollars ($10,500.00) for the property described hereinafter and under attachment herein, and that said sum is still the reasonable value of that property at this time.

That the property attached herein and claimed by the undersigned, is described as a Motor-grader with Caterpillar Model 12, serial number 9K-7086.

Plaintiff's Exhibit No. 1—(Continued)

Wherefore, demand is made upon you for the immediate release and surrender of said property to the undersigned or its attorneys.

NEWMAN & NEWMAN,
Attorneys for Claimant.

By /s/ ANTHONY M. NEWMAN.

State of California,
County of Los Angeles—ss.

Anthony M. Newman, being first duly sworn says: That he is the attorney at law and attorney in fact of the claimant, Constructora, S. A., a Mexican Corporation, and in such capacity signed the foregoing notice and claim; that he has read said document and the facts therein stated are true.

/s/ ANTHONY M. NEWMAN.

Subscribed and sworn to before me this 9th day of May, 1949.

/s/ BENJAMIN U. VEGA, JR.,
Notary Public in and for said
County and State.

My commission expires April 25, 1952.

[Endorsed]: Filed May 11, 1949, Superior Court.

Plaintiff's Exhibit No. 1—(Continued)

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 556290

W. W. SHEPHERD, et al., etc.,

Plaintiff,

vs.

JULIO A. VILLASENOR, etc.,

Defendant.

JUDGMENT RE THIRD PARTY CLAIM

This cause came on regularly for trial before the above-entitled Court, the Honorable Daniel N. Stevens, Judge Presiding, sitting without a jury in Department 23 thereof on the 3rd day of June, 1949. William K. Young, Esq., appearing as counsel for the plaintiff and Messrs. Newman & Newman, by Anthony M. Newman, appearing as counsel for the Third Party Claimant, and the Court having heard the testimony, and having examined the proofs offered by the respective parties, and the cause having been argued by the respective parties, and the Court having been fully advised on the premises, and the cause having been submitted to the Court for its decision, and the Court having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and the decision aforesaid:

Plaintiff's Exhibit No. 1—(Continued)

It Is Hereby Ordered, Adjudged and Decreed:

That Third Party Claimant is the owner and is entitled to the possession of the Motor Grader under attachment and that the Sheriff is ordered to release said property to it.

Dated this 17th day of August, 1949.

/s/ DANIEL N. STEVENS,
Judge of the Superior Court.

[Endorsed]: Filed August 17, 1949, Superior Court.

Entered August 18, 1949.

No. 556290

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners, Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO.,

vs.

JULIO A. VILLASENOR, etc.

State of California,
County of Los Angeles—ss.

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Petition for Hearing, etc., filed May 10th, 1949; Order, etc. filed May 10th, 1949; Receipt, dated May 11, 1949; Third Party

Plaintiff's Exhibit No. 1—(Continued)

Claim, May 11th, 1949; and Judgment re Third Party Claim, filed August 17th, 1949, and thereafter entered August 18th, 1949, in Book 2069 at Page 368 of Judgments, on file and/or of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 23rd day of December, 1952.

[Seal] HAROLD J. OSTLY,
County Clerk,

By /s/ H. EPPERSON,
Deputy.

Admitted in evidence March 4, 1952, U.S.D.C.

Mr. Newman: If the Court please, we have marked in that file the four items which we consider pertinent. The third party claim action that was filed contains the original third party claim, the writ of attachment, and the judgment of the court. [5]

* * *

Mr. Newman: Of course we may say just this much; that we contend that the sheriff had constructive possession by the mere service of that writ of attachment.

I agree with Mr. Young that he had no physical possession, that he didn't carry the motor grader, nor any agent for the sheriff, carry the motor grader out of the premises.

Mr. Young: Do you also not agree that the sheriff did not place a keeper in charge?

Mr. Newman: That is correct. [7]

* * *

Mr. Newman: If the Court please, we have an offer of proof on the matter of damages, which we have had the two experts agree upon, but Mr. Young, I believe, wishes to object to the introduction of the loss on detention on the [10] basis—we say that the cases we have cited in our brief show that aside from the money——

The Court: I understand what you said in your briefs; do you expect to call your witness or read the offer of proof and let me rule on the objection?

Mr. Newman: We have a stipulation.

Mr. Young: We have a stipulation if the witness was called, as to what he would testify to, and the stipulation is without prejudice to either Mr. Newman or myself with respect to its admissibility.

The Court: Read the stipulation as an offer of proof, and then make your objection.

Mr. Newman: It is your figures.

Mr. Young: You read it.

Mr. Newman: The loss of use for one month would be a gross of $575, and a net of $381.40. Loss of use on the basis of two weeks or less will be $192 gross per week, and $148 net per week. On the basis of one day, five days or less, $39 gross per day, and $30.20 net per day. The daily rate is applicable only if no more than five days are involved.

Mr. Young: Your Honor, in connection with this stipulation it is my understanding that the difference between the gross and the net figures is represented by the amount that it would cost the lessor to maintain and keep the equipment in good condition during the period of time it was being used by the [11] lessee, so that his net recovery would be the net figure that has been stated in each instance.

The Court: All right.

The stipulation is entered into without prejudice to your right to object, and Mr. Newman has offered this stipulation as being the gist of what experts would testify to, and you so stipulate?

Mr. Young: Yes, your Honor.

The Court: What is your objection?

Mr. Young: I wish now to object to the admissibility of the evidence on the ground that the measure of damage, if any, of the plaintiff, is limited to the costs, expenses of recovering possession of the property assertedly levied on improperly, which in this instance would be represented by the figure stipulated to in the stipulation on file respecting the attendance of Mr. Oriani, an officer of Constructora, S.A., in the sum of $225, plus reasonable value of Mr. Newman's legal services in prosecuting the third party claim, which is alleged in the complaint to be the sum of $500. In fact, I believe that he alleges that that sum was paid to him——

Mr. Newman: Excuse me, Mr. Young. It was stipulated that the court would fix, from an exami-

nation of the third party file claim, the reasonable services we would be entitled to.

Mr. Young: That is correct. And I am calling attention [12] to the allegation of the plaintiff that that sum is $500.

The Court: The gist of your objection is that the plaintiff, if he is entitled to recover, is entitled to recover only his expenses in regaining the property, together with interest and attorney fees, and interest on that money?

Mr. Young: Yes, your Honor; and also the traveling expenses of the man that came up here, in the sum of $225.

The Court: I don't think that objection is well taken at all. I don't see any merit to that. The objection is overruled.

If that contention was right, no man would have the right to recover for the loss of use of his property.

I read your brief, and those cases that you cite in support of that are cases where a person was suing for the value of his property, and the court said when he gets his property back that is in mitigation of the loss he suffered of being deprived of his property. But it certainly doesn't answer the question as to loss of use, so the objection will be overruled and I will accept the stipulation.

Mr. Newman: Plaintiff rests.

The Court: In your pretrial statement of facts there are two other items, aren't there, the matter of attorney fees and expenses?

Mr. Newman: Which we have agreed upon, your Honor.

The Court: The pretrial stipulation shows the expenses [13] were $225, and the court under the stipulation is to determine a reasonable counsel fee in the third party claim.

Mr. Newman: That is correct.

The Court: And a sum not exceeding that alleged to have been paid?

Mr. Newman: That is correct.

The Court: So the court is to fix a reasonable attorney fee not exceeding $500. Is that right?

Mr. Newman: That's correct, your Honor.

The Court: All right. Plaintiff rests.

I understand that that stipulation, when you fixed the one day rate, the one day rate was only to apply if the detention was for five days or less?

Mr. Newman: If the contract for the hiring of the chattel was for five days or less, the only way these gentlemen could help us would be to say if they were renting the equipment they would rent it on the following basis.

The Court: In other words, if they were renting it and were renting it for five days or less, they would have to pay the figure shown; if they were renting it for two weeks, at least, they would pay on a weekly basis; if they were renting it for more than a month, they would pay on a monthly basis?

Mr. Newman: That is correct.

The Court: I understand. [14]

Mr. Young: Your Honor, at this time I wish to move for a judgment of nonsuit on behalf of the

defendant, and also for judgment at this time on the evidence adduced, for the reason that so far as the plaintiff's case appears, this case represents one of damage without injury, assuming that legal liability exists for levying of the writ of garnishment, on the ground that it appears that the first time the plaintiff made known his position to the defendant that it claimed title paramount was on May 9th, and that on May 10th by the action of the defendant the plaintiff was entitled to have possession of its equipment, except for the fact of the restraining order issued by the Superior Court, and that the detention after May 10th is referable exclusively to the restraining order, and therefore under those circumstances the recovery of plaintiff in this action would be strictly on the basis of nominal damage, or as a mattter of fact damage without injury, because the only actionable period in which he was damaged by the position I have taken is for the one day. Furthermore, there is no evidence or showing as to when—on behalf of the plaintiff—as to when he was entitled to possession, notwithstanding his ownership.

In other words, two separate entities exist with reference to enjoying the property; one, the ownership of title, and the other the ownership of possession.

One of the stipulations in the case, as we know it, is [15] that on the day that this garnishment was served, February 24, 1949, the plaintiff, a Mexican corporation, engaged in business in Mexico, was not lawfully entitled to possess the equipment in

Mexico, by virtue of its presence in the United States, and having not received at that time a valid consent from the Government respecting its exportation, that having not been received, according to the stipulation, until sometime in March——

Mr. Newman: May I interrupt you, Mr. Young?

The Court: There is nothing to prevent the plaintiff corporation from having possessed and used the equipment in this country, is there?

Mr. Young: No, except that there is no showing that they suffered any compensatory damages by virtue of their possession of it in this country. Under the authorities that I have cited to your Honor damages must be compensatory, and they must show that they had an oportunity to enjoy its use in a pecuniary way. And the mere naked possession of it without being financially prejudiced would, in my opinion, violate the principles of the law of damages as laid down by the Federal Court.

The Court: I can't agree with you. When plaintiff proved that it owned the equipment, I think the inference would flow from ownership of the right of possession. I think the burden would be upon you to prove—if it didn't have a right of [16] possession, to so prove that, so I am not concerned with that point.

Now, as to making proof of the use that it would put it to, I can't follow you on that. This is not a relic. It is a commonplace type of motor equipment. Suppose the Mexican corporation had been informed that it couldn't get its permit for six months or a year, don't you think it could have

gone out and made some contract and leased the equipment here in this state to some outfit that would have used it?

Mr. Newman: For the purpose of clarification, if the Court please, the permit was pertaining to a flat car permit, and not an export permit. [17]

The Court: Is that correct, that the permit involved was only for the use of a flat car and not the export of the grader itself?

Mr. Young: Counsel may be correct in that, your Honor. I haven't examined it in that light, but I will do so now, so that we can clarify that.

I don't believe that the documentary evidence that exists on that point is consistent with his statement.

Mr. Newman: You showed me, Mr. Young, a slip of paper at the pretrial hearing, which I believe was from some railroad board. Do you still have that with you?

Mr. Young: Yes, I have the application that was made on behalf of the Constructora to the Government in Washington with reference to this matter, and also the permit that was granted in response to that application.

Mr. Newman: What does the permit show?

Mr. Young: I think the permit has to be read in the light of the application.

The application says that, "We wish to make an application for a permit to have two flat cars loaded with equipment or machinery consigned to Constructora, S. A., of Mexico, cross into Mexico," then they go on to describe the importance of the equip-

ment and its delivery to Mexico. So it seems to me that the permit relates to the propriety——

The Court: There is no stipulation, at any rate, on that [18] point.

Now, as to your next point, that assuming there was a valid deprivation of the plaintiff's right to use, your point that plaintiff has no rights until it files its third party claim, I can't follow you on that.

If I own a car or piece of property and you wrongfully take possession of it, my right accrues when you take possession of it. I wouldn't even have to make a claim. I could wait six months and then sue you for trespass, as I read the cases.

As to your point that after the date of the injunction on May 10th, that is a nice point.

I did a lot of work last night on that. That is a nice point of law, and here is what I have discovered and concluded.

I found one other case that you gentlemen didn't cite. It is the case of Breard v. Lee, 192 Fed. Rep. 72. It is listed as being in the Circuit Court in the Northern District of California in 1911; however, it is a decision by Van Fleet, District Judge, on a demurrer.

Maybe in 1911 this Court in California was called a Circuit Court. But it appears to be a trial court decision by Van Fleet. And the Court says:

"The complaint in this case counts in trespass for damages suffered by the wrongful seizure and conversion of certain personal property belonging to [19] plaintiff under a writ of attachment. De-

fendant has demurred thereto on several grounds, which may be briefly noticed.

"After alleging the ownership of the property in plaintiff, and certain facts by way of inducement of special damage as to the particular use to which it was destined and specially valuable to plaintiff at the time, it is alleged, in substance, that the defendant, with full knowledge of the plaintiff's ownership and of the particular use for which he intended it, caused and directed the property to be seized and taken under a writ of attachment issued in an action by defendant against a third party; that the defendant in such attachment had no interest of any character in said property, of which fact this defendant was informed, and a demand duly made upon him for the release of the attachment, but which demand was refused; that the property was not taken inadvertently or by mistake, but that it was knowingly, willfully and wrongfully levied upon and seized at defendant's said direction, with the purpose by the latter to harass, injure, and oppress the plaintiff; and that defendant was actuated in the premises by malice. Damages both actual and exemplary are alleged and prayed." [20]

The court is there reciting the complaint.

"Wherein, under well established principles, these facts are lacking in the essentials of a cause of action for a tortious taking and conversion of property, is not readily to be perceived. Certainly no question is better settled by the course of decision generally under our system than that one who takes the property of another without right,

whether under color of official authority or otherwise, is guilty of a wrongful and tortious act, and that an action in the nature of either trespass, trover, or replevin will lie for its correction. This is true as well where the property is taken under a supposed claim of right as where the taking is with knowledge of the wrong, since in either case the trespasser acts at his peril. And one who directs the taking by an officer executing a writ of property not rightfully subject thereto is equally guilty of the wrong committed as the officer who executes the writ. In such an instance both the officer and the one who directs the taking are joint tort feasors, and either one or both may be held responsible by the owner at his election. These principles are so fully established as to require no elaborate citation of authorities in their support." [21]

Then I am impressed by the decision of Judge Shinn which is cited in Plaintiff's brief. McPheeters v. Bateman, 11 Cal. App. 2d. There Judge Shinn distinguishes between a situation where an action is brought by "A" against "B" and "B's" property is attached, and an action by "A" against "B" where "C's" property is attached, and makes what amounts to an exception in a case of an attachment. I will come in a minute to the injunction problem.

As I read that case and the case I have just cited, where "A" sues "B," and a third party's property is attached, that third party has an action at law for trespass. Where "A" sues "B" and "B's" property is attached, "B" is apparently relegated

to either an action for malicious prosecution, abuse of process, which is very similar, or an action on the attachment bond. Nowhere have I seen spelled out particularly the rationale of that distinction. But it seems to me logically that there is a rationale for that exception, and this is what I think it is:

The law apparently is tolerant in permitting plaintiffs to sue when they assert a claimed right. That is as it ought to be, a person should be under no particular burden if he wants to bring a lawsuit. There are exceptions, such as libel and slander, where a bond is required, or cases of nonresidents where a bond is required. But ordinarily plaintiffs should be free to bring a suit. On the other hand, the defendant [22] who is sued should not be entitled to turn around after the conclusion of the first suit and then sue the plaintiff for wrongfully bringing the action. He shouldn't be entitled to do it easily. So the law has put an extra burden on that defendant, and has said, "If you want to sue that man who sued you, you have got to either sue upon some undertaking that he issued, or you have to sue for malicious prosecution or abuse of process, in which event the law is going to put an additional burden upon you. You are going to have to show that there was no probable cause for bringing the action in the first instance, the first action, then you are going to have to show malice."

Now, that makes sense. A plaintiff is allowed to bring his suit. A defendant can't retaliate, unless he bears an additional burden and makes such showing.

Why is there an exception where a third party is involved? The third party is an innocent bystander. His property has been attached, we will assume for argument, improperly or wrongfully, and why should he be under the burden of proving lack of probable cause and malice? He is not a party to that action; he wasn't a party to be controversy; he is brought in, as it were, from the outside, so the law says as to him you don't have the same burden that the defendant has, you don't have to prove probable cause, the lack of probable cause and malice, you may sue in trespass, because you as a third [23] party had your property trespassed upon.

It seems to me that is the rationale of the distinction of the attachment cases. And it seems to me, therefore, that where the attachment runs against "C," "C's" property, where the suit is between "A" and "B," that "C" has that cause of action without proving malice and without proving probable cause.

Mr. Young: However, for actual damages only.

The Court: Yes, certainly. [24]

* * *

But if the rationale on attachment is logical, then the same thing, it seems to me, should apply to injunction. Attachment and injunction are both extraordinary remedies, ancillary remedies to an action, and both may have the same effect, as in this case the garnishment, the attachment of property, the injunction against its disposal would have the same effect.

If the logic in the attachment cases is good, why doesn't the same logic apply to injunction? And, accordingly, it is my conclusion, and this is tentative at this stage of the case, as I expect to do some more work on this as the case progresses, my tentative opinion is that where a third party is affected by the injunction he has his action without having to prove lack of probable cause, and without having to prove malice, and that the rule in the attachment cases should apply to injunction as well. If that is true, therefore, under the stipulated facts the defendant caused the injunction to be issued, by which the plaintiff was restrained from having the use of his property, and I think the plaintiff has a cause of action independent of any bond which doesn't exist here, and without proving malice and without proving lack of probable cause.

That may not dispose of all of your contentions, but the ruling of the court is that the motion by the defendant is denied, without prejudice to your renewal of some motion [25] that would have like effect as we progress with the case.

Do I make myself clear?

Mr. Young: Yes.

The Court: All right. [26]

* * *

Mr. Young: Your Honor, I believe before defendant rests that there is one stipulation that defendant would like to have the benefit of.

I believe in response to my inquiries of Mr. Newman that he may be willing to subscribe to the stipulation that the plaintiff in this action was

financially sound and able to employ attorneys or procure bonds or expend monies that may have been indicated or desirable in pursuing and recovering the possession of this motor grader.

Mr. Newman: Without any prejudice to the plaintiffs we so stipulate, for whatever it is worth.

The Court: It may be considered a part of the record in the case prior to the time that the plaintiff rested and prior to the time that the defendant made its motion. [35]

* * *

The Court: Mr. Young, before you start arguing, it might be of some help to you, one of these points I mentioned before the adjournment was this point concerning the jurisdiction of the Superior Court, based upon those cases you cite, and I think I understand your position and that is although those cases you cite were cases involving money, sort of an inference from those cases is that if the property is not in the possession of the attaching officer, garnisheeing officer, then it is not a proper case for a third party claim.

Mr. Young: That is my position, yes.

The Court: I noticed in one of those cases, a decision by Judge Bishop, that he pointed out that although the claim wasn't proper because the money hadn't been paid to the sheriff, that had the money been paid the sheriff the third party claim would have properly laid.

Mr. Young: That is consistent with the theory that I have been advancing, that is, the sheriff must

have manual possession, whether it is property or money or whatever it may be.

The Court: I wanted to have your point in mind.

That point gave me some concern, and in reading 689 the section starts out, "If personal property levied on is claimed"—they use the word "levied" in that section. I am inclined to think that although those cases that you cite are probably [45] correct as far as money is concerned, I am inclined to give such interpretation to 689 because of the use of the word "levied" as would include cases where the property was not in the possession of a sheriff.

I tried to find some definition of "levied," and there is no definition as such set forth in the C.C.P. However, from what checking I did I come to the conclusion that the word "levy" means the execution of a writ. The word "levy" means the execution of a writ of attachment, a writ of execution. And that conclusion is fortified, or I am led to that conclusion by other sections throughout the C.C.P.

For instance, if you look in the index of C.C.P. under "levy," they refer you to attachment, execution, claim and delivery. Then you look under those sections of the index and you find sub-section levy, and under it you will find the sections describing how the officer is to execute the writ.

Now, of course the index is not part of the code; it is just done by somebody who compiled an index, I realize that, but if you read those sections over I am inclined to believe that the word "levy" means execution of a writ.

542b is particularly helpful on the definition of the word "levy." It reads as follows:

"An attachment or garnishment on personal property, whether heretofore levied or hereafter to be levied, * * *" [46]

In other words, there is the word "levied" in connection with garnishment.

542b, by the way, concerns only the length of time. But they use the word "attachment" or "garnishment" of personal property whether heretofore levied or hereafter to be levied, and so forth.

I, therefore, unless you can persuade me otherwise, think that the word "levy" in 689 is broad enough to cover a garnishment situation where the property has not been brought into the possession of the attaching officer, the garnisheeing officer. [47]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of December A.D., 1952.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed December 18, 1952.

DEFENDANTS' EXHIBIT A

Sh-Ci-56

Case No. 556290

W. W. SHEPHERD, et al.,

Plaintiff(s),

vs.

JULIO A. VILLASENOR, Doing Business Under the Firm Names and Styles of Juavi Export Co. and Juavi Fibres Company,

Defendant(s).

To notice of garnishment and demand for a statement served on me this 26th day of February, 1949, by the Seriff of Los Angeles County, under and by virtue of a Writ issued in the above-entitled action, my (our) answer is: That I am (we are) indebted to said defendants, in the sum of $ ..... and that I (we) have in my (our) possession and under my (our) control personal property belonging to said defendant(s), to wit: one caterpillar 12 Diesel Motor Grader, Serial 9K7086.

Signed:

BELYEA TRUCK CO.,

By /s/ [Indistinguishable.]

Dated: 8-4-49.

Please Return This Answer to Garnishment (In Duplicate) to Sheriff, Civil Division, 206 Hall of Justice, Los Angeles 12, California, Promptly.

Admitted in evidence March 4, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 40, inclusive, contain the original Complaint; Amended Answer; Amendment to Complaint; Stipulation of Facts and Issues and Pre-Trial Order; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for February 11, 1952, and April 29, 1952, which, together with reporter's transcript of proceedings on trial and the original exhibits, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 19th day of December, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13669. United States Court of Appeals for the Ninth Circuit. W. W. Shepherd and Norman D. Shepherd, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co., Appellants, vs. Constructora, S. A., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 22, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals,
Ninth Circuit

No. 13669

CONSTRUCTORA, S. A., a Corporation,
Respondent,

vs.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO., a Co-Partnership,
Appellants.

STATEMENT OF POINTS ON WHICH APPELLANTS RELY

The following concise statement is submitted by appellants as the points on which they intend to rely on the appeal herein; viz,

1. The judgment in the third party claim proceeding is void for lack of jurisdiction.

2. No valid attachment resulted from the service of the garnishment.

3. The motion for a judgment of nonsuit should have been granted.

4. Amount of damages recoverable is limted to period the motorgrader would have been in actual service.

5. The proper measure of damages is the expense in recovering the motorgrader.

6. Damages for loss of use of motorgrader erroneously awarded for period during which injunction was effective.

7. Respondent's asserted loss of use resulted from the negligence (or laches) of its bailee and itself.

* * *

Respectfully submitted,

/s/ WILLIAM K. YOUNG,
Attorney for Appellants.

[Endorsed]: Filed December 29, 1952.